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# Legal or business personality of the commercial companies according to business law in Kosovo

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## Abstract

Companies are founded by two or more physic persons or entities that are awarded for the achievement of common objectives in business, making contributions to society, as defined in its charter that in essence is a general term that means a society - society trading. As such the company has an identity apart from the legal authentic it is clearly separate from its members or shareholders. In this segment Kosovo has an interesting and intense legislative history. The transformation of the Company Law, from the time former social system to the establishment of UNMIK - Regulation in 1999 mark the greatest progress towards a modern economy - market. Two recent laws on commercial companies are based on the German model. It what is important has to do with the provision of legal guarantees for the provision of basic modalities for an early business organization in which local and foreign investors are familiar. The dilemma which now arises in the field of theory of business law is that it has been reasonable choice lawmakers two business formations to legal subjectivity removed and replaced with business subjectivity. It what is evident has to do with the fact that, at least so far, there is no comment, justification, debate, etc., that this setting expressed above, at least in terms of the science, to handle in terms of advantages or its disadvantages. The paper aims to provide a view of why partnerships society, despite the lack of legal personality has strong and stable position in life legal practice of doing business in our country.

**Keywords:** natural/physic person; legal person; business; legislation.

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## 1. Introduction

Kosovo is ranked among countries that throughout its history have gone through a dynamic political, economic, legislative transformation of, etc. One of the main segments in this process has been laws on commercial companies. Before the war of year 1999 in Kosovo were applicable laws of the former Yugoslavia and Serbia. This situation changed with the establishment of UNMIK - Regulation, immediately after the 1999. First law regulations issued by the international administration, which

were dedicated to the regulation of commercial companies' also now positive assessed and suitable for socio-economic environment of the time. This legislative base created conditions before commercial character of a society defined format or its facilities. Most important of this stage is to change the perception of the past system for commercial companies by relocating them to the modern basis. The modern concept linkage to the standards of the best practices of the EU, which essentially have the character growing "acquit" for all forms of companies which are actually trading due to their shape, no matter what object have .

The country's declaration of independence necessarily noted the need for improvement and completion of company law. This is not only due to changing political and legal circumstances but also because of UNMIK legislation - Regulation on commercial companies, despite modern bases, it was not in line with economic developments. Although the Assembly of Kosovo, then still under the administration of UNMIK - Regulation (20 September 2007) adopt the Law no. 02 / L-123 [1] on Business Law It had to be amended and supplemented in 2011. Enclosure of this law created a good balance with the requirements for alignment with EU legislation and economic development needs of the country. To avoid overloading the functioning of the legal structure of companies with highly articulated, attended a legislative policy of not foreseen in the law unenforceable provisions in the country's economic circumstances. The law "On traders' standards reflect best practices of the EU. According to information we have obtained from the Ministry of Trade and Industry, the department has undertaken a series of actions in order to change the current law on commercial companies. Because it is only a draft it appears that the changes are not so great on the current law. It what is not changed either in this draft is the fact that the partnership (in the draft now called partnership) and commendatory have not a legal entity.

Whatever the signing of the Stabilization and Association Agreement, with the European Union remains a challenge to align even more legislation for companies and enterprises during the pre-accession phase. It is important to mention here that the process of approximation of legislation should follow a strategic approach, taking into account the overall development of socio-economic development of the country, the required capacity of administrative and financial resources, and potential impacts of the financial, economic, and environmental regulatory work. This preparatory work before drafting new legislation in this segment in line with the EU legislation is a necessity.

## **2. A historical context for the understanding of the legal person**

The issue of understanding the nature of the legal person historically is one of the most controversial topics within the legal science. As such, truly said, even so far not reached the unification of such attitudes. History of understanding of the legal entity indicates that it is developed depending on the degree of development of social- economic relations. The problem of the legal person has been reported that in old Rome although Roman law up to the imperial period within its system does not know the meaning of a legal person [2]. But in this period onwards, the quality of the legal entity that is the subject that creates rights and obligations recognized civic municipalities' different societies (colleges, Universities) and state cash. The science of Roman law is not specifically take into consideration the meaning of a legal entity but has simply perceived as a fiction. In the middle ages, due to the closed nature of the economy, from the perspective of today's outlook, the legal person did not exist [3]. But still, even at that point of time a group of lawyers from several institutions medieval monarchical order, as were medieval monasteries and other institutions, have considered legal persons. Understanding the legal person receives a qualitative development momentum during the bourgeois capitalism especially supplemented during the course of modern capitalism. For this reason codes from the first half of the nineteenth century, the general provisions not specifically contained in the legal person but only by chance. On the contrary, modern codes and laws matter of juridical and regulate more clearly and systematically [4]. In this context there are a series of theories on the matter which, more numerous, are found in the legal literature belonging to the XIX and XX century. As such, more or less, they are the result of attempts to clarify the nature of the legal entity. In this way it can be explained the juridical theory of fiction. This theory has been reported that at the time of glossators which in the most clear and formulated Savinji [5]. This theory starts from the view that only one can be a legal entity because only he can have and is willing to create specific legal work. On the other hand, according to this worldview, the legal person is just a fiction that is of such a form of the person taken in reality does not exist but because of social necessity and appropriateness that,

taken as exist respectively treated as a legal person. As a result of reaction to the fiction theory follows organic theory represented by the English philosopher Spencer and the German lawyer Girka. According to them, as well as a legal entity natural person is social reality. They consider that the bodies of the legal person are existing, living, that within the legal relations appear based on what their activity is also considered to have the ability of their own doing. The next theory that has made serious steps in determining the meaning of a legal nature is the theory of interest represented by Jeringovi. According to her, some legal entity is not subject to the law and they are only its members or users who enjoy "legal interests provided" to the legal person. The rationale of this approach is based on the fact that a person is found neither enjoy nor feel or to create work settings. German and Austrian theorists Vindshajd especially Brink, contrary to the theory of interest, their thoughts try to argue with that property, rights and obligations of a subject with quality entity, in no way represent the users of it (the theory of permanent real goals). Therefore, the property of a legal person does not exist for the purposes of users or members but it exists because of the scope on the basis of which is a legal person established by statute. Author Planiol French has formulated the theory of collective assets under which the legal person is considered a separate species of this collective property, holders of which are its members, ie its users [6]. According to some authors Ehrenzweig, Kohler, Kelsen, Colin, Capitana, etc, the legislator has the opportunity to announce any lineup legal person if at a given moment is considered necessary for the user and for the legal order. According to the theory of social reality, represented by the French theorists Mishu and later Saleilles, the legal entity is a reality, the creation of the society which ensures the interest of a certain group of people. This theory is largely accepted by the authors Russian Agarkova, Genki, Bartus and Veneiktov who, in addition to what is said on the theory above, stated that the reality of the social creatures should be added to the conditions and character class which has been strongly entrenched the belief of socialist system [7].

### **3. The meaning and nature of the legal entity according to modern concepts**

Overall is accepted the rule that a legal person is considered respectively handled as a social creature which respectively frequency of the legal system of a given country recognizes the legal capacity. But in reality when it comes is when a frequency of the moment that such an organization or social gains that attribute the situation changes, historically member has different mentalities.

Theory of law has it's doubts whether a person should be designated, acting as a social Establishments, legal subjectivity to recognize directly or indirectly, in accordance with any particular rule or it is not necessary at all. Science of law considers that certain social structures can be recognized as legal subjectivity within the legal relations if holding a minimum of three assumptions in the following way:

- ✓ The first, to be a social structure that is a relatively strong organization and stable in the outside world that all should represent organizational unity;
- ✓ The second, to be the organization with special assets, which are divided clearly by means of its members; and
- ✓ The third, that the presumption of knowledge of legal capacity may be realized on the basis of three different systems.
  - a) *The system of freedom of establishment.* Under this concept a legal person can be established under the system of freedom in participation in the association - which regulated organization statute. The application, which has not constitutive character, is presented to the competent state body. Under the normative act, the company acquires legal capacity created in two ways. In the first direct rules and provisions singular, precise position individualized legal person respectively. In a second version, the establishment of a legal person under the provisions

implemented specific presumptions also determine which must be met. However, legal subjectivity arises only after registration. Competent agency verifies that meet certain legal presumptions and if verifies that they are satisfied then must be recorded.

- b) *Concession system.* Under this concept social establishment acquires legal capacity under a special act passed by an administrative body. Act shall be granted under a discretionary assessment. Our legal system does not have a rigid and exclusive, which would be universally valid for the origin of all types of legal entities, irrespective of their character. Our legislative system, the theory and practice is likely that each time more and more the norm creates legal system provides certain variants of this system. With this system there is a possibility of concession but only exceptionally e.g. connected with foreign companies and foundations.
- c) *The legal system.* Local governments gain legal subjectivity directly by law. In the traditionally legal subjectivity profit business associations, associations of citizens and the new times of political organizations and political parties respectively apply the system of normative acts. For registration of each particular form of legal person exist certain forms through which determined how these entities to apply in order to earn their subjectivity legal and business so that they recorded respective state administrative agency [8].

The legal entity, except legal capacity has the business and illegitimate business capacity. Legal capacity of a legal person is regulated by statute. Depending on the legal basis for some legal persons instead of "statute" as founding act, used the term "rule" (act of establishment). However, for some the process of establishing legal entities provided by the contract. Business capacity of a legal person shall mean the capacity of the entity concerned to be able to transfer the rights and obligations and that they be able to carry on independently. In the same way as natural persons and legal entities have the opportunity to be in a position to cause damage by failing to meet legal and contractual obligations. Also legal persons can also cause civil offenses in the same way as natural persons. According to the results so far of legal science in general, legal persons can be divided into four basic types of legal entities as follows: public and private legal persons, corporations and foundations [9].

Public legal persons, to local governments and administration, for certain institutions financed by public funds, public companies, etc., legal rules apply to state institutions. All other species listed in the legal persons of private law legal entities (commercial companies, associations, foundations, etc.). For civil law matters is the separation of corporate and foundations. Division of legal entities into corporations and foundations is a substrate of legal personality. Corporation is an independent legal entity consisting of a collectivity organized the Persons of physics different from individuals who are its members. Among typical recognized forms of corporate we have: limited liability companies and Joint Stock Companies. Legal person may cease to be such by certain legal provisions or by the act of state bodies (prohibition). If the legal entity has been created to achieve the goals set then it may cease to be so in the moment of achieving the goal. Legal person may cease even if the specified number of its members is reduced more than the number of members which has been defined by legislation or legal status of the person. Legal person has the opportunity to rest with the decision of

the members who make up as well as the disappearance of property. A legal person shall also cease to bankruptcy.

#### **4. Legal personality of companies or business in accordance with the legislation in Kosovo**

Company law in principle defines commercial companies as legal entities which are established on the basis of establishment act and charters by individuals/entities for the purpose of developing certain business activities and the achievement of profit. Business organizations are likely to be established in the legal form as business partnership (partnership) Limited Partnership, Limited Liability Corporation and Joint Stock Company. In addition to these forms, on the basis of special laws it is possible to establish other forms of companies or businesses.

Entrepreneurship i.e. Individual Enterprise is a natural person without the quality of the platform entity that develop their activities and form the basis of legal profit should be recorded in the register are recorded in this manner permitted activities usually are craftsmanship, professional work of art, etc. Individual entrepreneur enterprise operates its own name, in the name of another person or under a certain business name under the Law on commercial companies. The most significant change between the company and the entrepreneur is the fact that the company is a legal entity in some cases only business capacity while continuously entrepreneurial capacity of a physical. Among other differences are: Entrepreneurship on the occasion of the exercise of its activity has full responsibility for all obligations on all the goods themselves. In terms of responsibility, which serves the property of a natural person to exercise its activity if it is insufficient to meet the obligation / s then the natural person liable to private wealth?

On the other hand, to commercial companies, depending on the legal form, liability is determined otherwise. Society Partnership (the partnership) to obligations due on the whole answers all their wealth of this society partners who are jointly responsible for all liabilities of the company and its assets. According LBO this enterprise has no legal capacity of the platform. Even the company called "komanditore" of establishing two or more natural persons / entities on quality partners. This specific form created for the purpose of the exercise of certain business under a trade name, of which at least one has unlimited liability for the partnership (complementary) and at least one other person in this case is responsible for Limited who is dependent on the deposition accompanied (limited). Limited liability Company responsible for all obligations on its wealth while its members are not responsible for liabilities of the company except that part which actually determines their role in this society. In practice, a limited liability company is the most frequent form which recorded precisely by the fact that the responsibility of its founders limited the wealth of society.

According to the Law on Business Organizations, commercial companies, in principle, defined as legal entities which are established on the basis of Agreements by individuals / entities for the purpose of developing certain business activities and the achievement of profit. In summary this definition, in terms of their practical constitution, on the basis of documents in detail defines 1. Legal subjectivity; 2. Character contractual; 3 Common wealth of several people's natural and legal character; 4. Conduct permissible activities and 5. The purpose of businesses is the realization of profit.

#### **5. Business associations without legal entity**

The trade fair presents a set of legal norms that regulate the position of the companies, dealer and other members within the trade relations which private commercial entities create and realize the purpose of earning income eligible. The trade fair is a business respectively independent branch of law that regulates the legal status of business entities including their mutual arrangement and the state. In the area of commercial law which treats the legal sense of purpose of establishing commercial companies usually face three systems. Roman system of commercial companies (for profit) distinguishes from certain forms of companies - mergers citizens. The German system assumes that commercial companies and other forms of union established in order to realize their profits and the difference of their organization identified. Meanwhile, system Anglo - Saxon is based on the logic of corporations and companies whose goal is just profit. The trade fair presents a set of legal norms that regulate the position of the companies, dealer and other members within the trade relations which

private commercial entities create and realize the purpose of earning income eligible. The trade fair or business right is independent branch of law that regulates the legal status of business entities including their mutual arrangement and the state. In the area of commercial law which treats the legal sense of purpose of establishing commercial companies usually face three systems. Roman system of commercial companies (for profit) distinguishes from certain forms of companies - mergers citizens. The German system assumes that commercial companies and other forms of union established in order to realize their profits and the difference of their organization identified. Meanwhile, system Anglo - Saxon is based on the logic of corporations and companies whose goal is just profit.

The law on trading companies in Kosovo has failed to recognize the legal personality. With this law the legal personality is also removed two other social formations. However, these business formations have the right to contract, to own, to sue or be sued in its name. Precisely for this issue has been considerable debate in many countries, if these two forms partnerships must remain without legal personality or allowed to become business entities, with separate legal personality. In practice there are two systems in Europe. The first representing France, Luxembourg, Norway, Sweden, etc., which limited partnership companies offer them a certain degree of personality. The second comprises countries such as Germany, Austria, Belgium, Switzerland, etc., that partnership does not give a legal entity but they give the right to sue and be sued, hold property and make claims of creditors against the partners until the first creditor to have exhausted all legal remedies against the assets of the partnership.

Current law in our country but also to commercial companies law early on are more are based or under the influence of a second system.

Determination of legislators for such a choice is not accompanied by any explanation broad scientific basis and neither the theory of local business law, at least until now, has not provided a bit clearer opinion on the matter. Based on the concepts of theorists that support subjectivity of societies of partnership to that of legal personality supported the terms of the inability of the division of property and its owners by the community as founder and sole responsibility of the founders that creditors aloud. In reality, the concept appears to be in harmony with the general theory of current law. According to her and noted that the establishment of a legal entity clearly dependent on three presumptions which we have outlined above. From this perspective, in particular based on the presumption second constituting a legal entity, it appears that commercial companies and form partnership not meet this requirement. This is because a corporation or limited partnership with assets is organizations and special tools which are not separated clearly by its members.

6. If this comparative context in terms of analyzing the choices they made neighboring countries conclude that our choice is different from them. Almost all neighboring countries, with very few changes, its own laws on commercial companies - economy have adapted according to the French model. Republic of Albania with the Law on Entrepreneurs and Companies, in Article 3, paragraph 3, in addition to the dealer, all companies, after the moment of registration, legal personality recognized. The Republic of Montenegro Law on economic societies has provided more pluralistic elections. In Article 3, paragraph 1, of the law on Limited Liability Companies and Joint Stock Company at the moment of establishment - Registration enjoys the quality of legal person. However, according to Article 6 paragraph 4, the company's partners may be a natural person or legal entity. In addition to Article 10 paragraph 3 a similar choice is made and the form of limited partnerships.

In addition to Article 10 paragraph 3 a similar choice is made and the form of limited partnerships. The Republic of Serbia by the Law on commercial enterprises in Article 2, paragraph 1, states that economic Society is a legal entity which is established under the charter of individuals / entities in order to conduct business activities and the realization of profit. In paragraph 2 of this article recognized the legal personality of the partnership societies, limited partnerships, limited liability companies and joint stock companies. In this law, as in other similar acts of individual enterprise - entrepreneur is the physical person. Almost the same choices found in the Law on economic societies of Bosnia and Herzegovina. In Article 2 of the law stipulates that the company is a legal person which independently develops production activities, sales of products and provision of services in the market in order to realize profits [10]. One acts with complete legal regulation of companies in the region is estimated to be of the Commercial Companies Law of the Republic of Croatia. According to its

Article 2, paragraph 1, regulates the trading company established under the legal provisions of this law is a legal person, However, besides entrepreneurs, all other forms of these companies have a legal entity [11].

Despite these obvious changes we appreciate that the Law on commercial companies in Kosovo needs to be revised and supplemented in many ways. Firstly the situation and the country's economic circumstances have changed. Second Republic of Kosovo has signed a Stabilization and Association Agreement (SAA) with the European Union and introducing a series of new institutes is most necessary. Regarding this opinion, we should better clarify the content and format of the companies which have legal personality and those who have business personality. In particular the meaning of the corporation arranging the format of their union and many other issues that are not part of treatment in this paper.

## **Conclusion**

The economy it depends on the market, whereas the market is constituted by businesses and companies that participate in the market to exchange products and services for profit purposes. In all modern economies, the state plays a vital role, often even primary in the economic activity. The fundamental task of the state in relation to the economy of any country is to create and make possible a good function of legal and institutional platform on which economic activity take place. Therefore, under the provisions of the law of our country the trade association is the union of several natural or legal persons to organize trading in any field, in a joint company. Trade associations operate according the law and the legislation. The commercial character of an association is determined by its model or its entity. General partnerships, Limited Partnerships, Limited Liability Companies and Joint Stock Companies are commercial due to their form, no matter what entity they are. Trade associations gain their legal or business personality from the date they are registered in the commercial register. Changes in the association, in accordance with the law, including its extension, do not result in the creation of a new legal entity. In Kosovo, any person, organization, or group may establish and register a company for any lawful purpose, and be engaged in any lawful activity.

While UNMIK Regulation 2001/6 was a halved version of Western laws on commercial companies and in fact offered a good legal start, it still had some shortcomings. It lacked the harmonization with all EU directives and offered no clarity regarding the important issues concerning commercial companies operating in Kosovo. Current law on commercial companies is written based on the Austrian-German model and is in compliance with most laws on commercial companies in Europe. What is important for a market economy in transformation as in Kosovo, is the legal basis which marks a good start because it provides some basic forms of business organization with which foreign investors are familiar. As time pass, it will be necessary to amend this law in order to be suitable with legal sophistication of the business in Kosovo.

One of the dilemmas that have aroused debate on the theory of local business law has to do with legal and business personality of certain companies. When Kosovo was under UNMIK administration, basically the trade associations in that time had a legal personality but the other commercial organizations had no the same personality but simply had been called with a new quality, the quality of business activity. This choice is adopted from the German-Austrian model. According to this model, if a company has a legal authentic identity, separated from its members or shareholders, it acquires a legal personality. On the other side, the impossibility to divide the assets and it owners from the established trade society under their full responsibility and the responsibility and obligations toward the creditors do not permit them to have the quality of a legal personality



but only the business personality. Based on a comparative analysis we found that all the neighboring countries, viewed by the quality of the company's personality, are different from Kosovo.

Most of them adopted laws on commercial companies according the French model as well as to all forms of commercial companies, except individual entrepreneurs and businesses have the quality of legal person.

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